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No. 90-1249

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1990

R.R. DONNELLEY & SONS COMPANY,
Petitioner,

v.

JUDY PREVOST,
GERALD KOLINSKY, Compensation Commissioner,
Eighth District, State of Connecticut;
JOHN A. ARCUDI, Chairman,
Board of Compensation Commissioners, State of Connecticut;
RICHARD BLUMENTHAL, Attorney General,
State of Connecticut
Respondents.

Petition For Writ of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* CONNECTICUT BUSINESS & INDUSTRY ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS

The Connecticut Business and Industry Association ("CBIA") is the largest business organization in the State of Connecticut, having approximately 7,000 members that employ a total work force of over 700,000 employees. CBIA presents the views of its members on public policy and legal issues to legislative and judicial authorities.

As discussed in this brief, the Connecticut statute challenged in this case imposes significant and escalating costs on all or nearly all of CBIA's members.

CBIA has the consent of all the parties to the filing of this brief.

SUMMARY OF ARGUMENT

A Connecticut statute, Conn. Gen. Stat. §31-284b, requires that all employers providing accident, life or health insurance benefits to their active employees under plans regulated by ERISA[1] must provide the same benefits to their former employees who receive workers' compensation. The employer can provide the benefits by extending its ERISA plan to cover the disabled workers or by providing an alternative plan. With irrelevant exceptions, ERISA's "supersedure clause," 29 U.S.C. §1144, preempts all state laws which "relate to any employee benefit plan" covered by ERISA. The courts below found that §31-284b relates to ERISA-covered benefit plans but nonetheless held that it is not preempted.

ERISA preempts the Connecticut statute. The Second Circuit's decision is inconsistent with the statutory language and structure. It misreads ERISA by adding a broad new exception to the comprehensive supersedure clause drafted by Congress. The court also misread or ignored several of this Court's decisions.

Unless reversed by this Court, the decision below will have repercussions far beyond whether Petitioner must continue to pay

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[1] Employee Retirement Income Security Act of 1974, as amended ("ERISA"), codified at 29 U.S. C. §1001 *et seq.*

for Respondent Prevost's insurance. When it wrote ERISA, Congress intended to encourage employers to provide adequately for the insurance and retirement needs of their employers. When it wrote ERISA's sweeping preemption clause, Congress intended to establish a single, national law of benefits programs and intended to prevent the states from creating conflicting programs. The Second Circuit's decision undercuts both Congressional purposes. By permitting the states to impose burdens on employers in proportion to the benefits provided by their plans, the decision will discourage employers from providing generous benefits. By opening a major loophole in the supersedure clause, the decision will allow the states to balkanize the law of benefit plans.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE LOGIC OF ERISA AND PRIOR DECISIONS OF THIS COURT.

The essential flaw in the Second Circuit's analysis is that it validates and upholds state laws which relate to ERISA plans by imposing burdens on employers in proportion to the generosity of their ERISA plans.

The Court of Appeals interpreted this Court's decision in *Shaw v. Delta Airlines*, 463 U.S. 85, 106-108, (1983) to imply a novel exception to the supersedure clause.[2] The court found the basis for that supposed exception in 29 U.S.C. §1003(b)(3), which exempts from ERISA's coverage plans which are "maintained solely for the purpose of complying with applicable workmen's compensation laws." The Second Circuit read this provision as if it said "nothing in this Act shall be construed to exempt any person from a state law which regulates workmen's compensation." However, §1003(b)(3) is an exception, not to the supersedure clause, but to the definition of the kinds of employee benefit plans covered by ERISA. As the Circuit Court itself noted, A12, this Court has held

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[2] No party has contended that any of the statutory exceptions to the supersedure clause listed in §1144(b) saves §31-284b.

that "§1003(b)(3) excludes 'plans,' not portions of plans, from ERISA coverage; . . . . [T]he purpose of the entire plan must be to comply with an applicable [workmen's compensation] law." *Shaw*, 463 U.S. at 107. Because, as the Second Circuit itself held, A9, §31-284b is a law which "relates to" ERISA-covered plans, it cannot be saved by a provision which saves state laws only if they relate "solely" to a kind of plan not covered by ERISA.

Of course, as this Court noted in *Shaw*, §1003(b)(3) permits a state to require an employer to maintain a separate non-ERISA plan to provide specific workers' compensation benefits. That being so, this Court suggested in dictum that a state could also permit an employer to choose between providing the specified benefits by providing a separate plan or by extending its ERISA-covered plan. *Shaw*, 463 U.S. at 108. However, *Shaw* dealt with a state requirement that employers provide benefits specified in terms entirely independent of the provisions of the employers' ERISA-covered plans.[3]

In that respect *Shaw* is crucially different from the instant case. Here, Connecticut has measured the required extra workers' compensation benefits entirely by the benefits that employers provide under their ERISA-covered plans. Under §31-284b, an employer that provides especially generous benefits to its active workers must also pay to extend those benefits to its former employees who are on workers' compensation. By contrast, an employer that provides minimal benefits under its ERISA plan incurs minimal additional costs under §31-284b, while an employer that provides no ERISA benefits incurs no costs at all. For practical purposes, therefore, it is as if Connecticut had decided to fund benefits for persons on workers' compensation by imposing a tax on the amounts employers spent on their ERISA plans. Such

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[3] *Shaw* dealt with a New York Disability Benefits Law, N.Y. Work. Comp. Law §§200-242 (McKinney 1965 and Supp. 1982-83), which required employers to pay to employees unable to work because of nonoccupational injuries or illness (defined to include pregnancy) the lesser of $95 per week or one half their average weekly wage. *Shaw*, 463 U.S. at 89 - 90.

a tax would clearly "relate to" ERISA-covered plans and would be preempted under §1144(a). *National Carriers' Conference Committee v. Heffernan*, 454 F. Supp. 914 (D. Conn. 1978); *Birdsong v. Olson*, 708 F.Supp. 792 (W.D. Tex. 1989).

II. THE DECISION BELOW PERMITS STATES TO IMPOSE COSTS AND CONFLICTING OBLIGATIONS ON EMPLOYERS THAT OFFER ERISA-COVERED PLANS.

A. *The Decision Below Permits States to Deter Employers from Providing Generous ERISA Benefit Plans by Imposing Great Costs on Those That Do.*

When it adopted ERISA, Congress intended to encourage employers and employees to create plans which would adequately protect employees from illness and would provide employees with decent retirements. *See* 29 U.S.C. §1001(a). The decision below has exactly the opposite effect. It discourages employers from providing generous or even adequate benefits to their active employees by permitting the state to impose additional charges proportional to the amount the plan costs the employer. In the long run, as medical costs grow, the disincentives will grow and so plans are likely to become less adequate.

1. *The Second Circuit's Decision Penalizes Connecticut Employers That Provide Generous ERISA Benefits.*

Donnelley is not the only employer that faces higher costs as a result of §31-284b. The statute increases the costs of almost every employer in Connecticut, including all or nearly all of CBIA's members, by adding to the ever-rising expense of health care. Indeed, it is the employers that provide the most benefits for their employees that will be forced to pay the most increased costs.

Moreover, §31-284b creates incentives that will keep the costs of health care and workers' compensation rising. Given the enormous cost of health care today, one of the greatest incentives to work is to obtain health insurance that one could not otherwise

afford. Under §31-284b employers are required to continue paying health benefits to workers who are collecting permanent, partial disability awards, including persons who are capable of returning to work full time. Section 31-284b not only removes a reason for going back to work, it discourages such workers from going off workers' compensation because doing so would cost them their health care benefits from their former employer.[4]

It will cost about $18,900,000 this year to provide health insurance to Connecticut employees while they are eligible to receive workers' compensation benefits. This is calculated as follows: The average annual cost of health insurance paid by employers in Connecticut was approximately $2,820.00 per worker in 1989 (the most recent year for which statistics are available).[5] Assuming the average worker works 235 days per year,[6] the cost of insuring a worker was about $12.00 per worker per work day in 1989. The Connecticut Labor Department reported that in 1989 Connecticut workers lost 1,191,000 days of work due to work-related injuries for which they were eligible for workers' compensation benefits.[7] This number multiplied by the cost of coverage per worker per day results in a total cost of about

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[4] In Connecticut a person on workers' compensation is entitled to two thirds of his regular wages up to $719.00 per week, *see* Conn. Gen. Stat. §31-309; and, unlike his wages, his workers' compensation benefits, as well as amounts he receives through accident and health insurance, are tax-free. 26 U.S.C. §104(a). Thus a person on workers' compensation may make as much money as if he were still working.

[5] Levick, *Health care costs rise sharply for state firms*, HARTFORD COURANT, Feb. 1, 1990, p. D1 reporting Health Care Benefits Survey by A. Foster Higgins & Co., Inc.

[6] Assuming 49 weeks of work at 5 days per week, minus 10 holidays.

[7] *Connecticut Work Injuries Top 129,000 in 1989*, THE CONNECTICUT BUSINESS DECISION MAKER, (a publication of the Division of Worker Education of the Conn. Dept. of Labor), Jan. 1991, p. 1, citing statistics complied by Conn. Dept. of Labor.

$14,292,000 for 1989. Making the conservative assumption that Connecticut's health insurance costs will rise at no more than 15% per year, somewhat less than in recent years,[8] the cost for 1991 will be about $18,900,000.

Of course, even apart from the legal obligations of §31-284b, some firms will provide health insurance coverage for their workers for at least some of the time they are eligible for workers' compensation. Other employers will avoid all costs based on their benefit packages by offering no benefits at all. Nonetheless, the statute will impose additional costs on many employers over and above their voluntary ERISA plans. These costs are in proportion to the amount of benefits each employer's ERISA plan provides.

Section 31-284b interferes with those ERISA plans which are the result of collective bargaining among employers and employees.[9] Whether or not the plan results from collective bargaining, the money §31-284b requires is money which becomes unavailable to fund other benefits. The money diverted by §31-284b will also be unavailable for wages, new jobs and business expansion. In economic terms, §31-284b amounts to a hidden tax on employers in proportion to their expenditures for ERISA plans.

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[8] Costs rose 15.7% from 1988 to 1989, Levick, *supra*, and rose 17.1% nationally from 1989 to 1990, Geisel, *Employers' health costs rise 17.1%*, BUSINESS INSURANCE, Jan. 28, 1991, p. 1.

[9] As this Court has held,

> Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for pre-emption of state efforts to regulate pension terms. [Citations omitted.] As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring pre-emption of intrusive state law.

Alessi v. Raybestos-Manhattan, Inc. 451 U.S. at 525-526. Although Donnelley's plan has not been collectively bargained for, §31-284b also applies to ERISA plans which do result from such negotiation.

2. *The Decision Below Sets a Precedent Which Would Permit Other States to Burden Employers in Proportion to the Generosity of Their ERISA Plans.*

If the Second Circuit's decision is allowed to stand, it will set a precedent that Connecticut and other states could rely on in passing similar laws imposing costs on employers measured by their expenditures on ERISA benefit plans.

The impact of the decision below is not limited to workers' compensation. ERISA §1003(b)(3), upon which the decision depends, also exempts from ERISA coverage plans which are "maintained solely for the purpose of complying with . . . unemployment compensation or disability insurance laws." Under the Second Circuit's analysis, a state could pass a statute it called an "unemployment compensation law" that required an employer that lays off workers to continue to provide, at the employers' expense, the same level of insurance and even pension benefits provided under the firm's ERISA plan, if any, for as long as the worker is unemployed, potentially for years. Such laws would be valid, on the Second Circuit's theory, as long as the state gave the employer a choice between extending the firm's ERISA plan to the laid-off workers or purchasing a separate plan. Similarly, provided that a state offered employers the choice between extending an ERISA plan or buying another plan, the state could adopt a "disability insurance law" which required an employer to pay an employee benefits "equivalent" to those under the firms' ERISA plan for as long as an employee is disabled, even for the rest of his life if the disability is permanent. Such laws would "relate to" ERISA plans in that the employers' obligation would depend on whether their firms had ERISA plans and the generosity of their terms. *See Ingersoll-Rand Co. v. McClendon*, --- U.S. ---, 111 S.Ct. 478, 483 (1990) (state law cause of action preempted because it depended on existence of ERISA plan). Such laws could bankrupt ERISA plans by requiring them to make huge, unanticipated expenditures that have not been properly funded, and could threaten the survival of employers that sponsor unfunded plans.

Moreover, the Second Circuit's analysis would open a yawning loophole in the supersedure clause. Merely by codifying a statute as "workmen's compensation," "unemployment compensation" or "disability insurance" and by offering employers the option of purchasing a second plan, a state could enact exactly the same type of regulations of ERISA plans that the courts have previously held preempted by ERISA.

The contrast between the outcome in this case below and the outcome in *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983), illustrates this problem. The court below acknowledged that "§31-284b was enacted in response to *Stone and Webster*," A4, and it has the same effect on ERISA plans as the earlier statute held preempted by ERISA in that case, A9. Yet because §31-284b offers employers the option of purchasing a separate plan to meet its requirements, the court held that it was not preempted, even though it admittedly related to ERISA plans, *id.* The court did not even require that the state show that this option is practical. In fact, it is not. The economics of health insurance plans are such that it would be much more expensive for a firm to separately insure a few disabled workers than to extend the coverage of its large group ERISA benefits plan. Covering workers' compensation recipients with a separate plan would invite litigation over whether the two plans are really "equivalent" and whether they remain so when one or the other is changed. The Second Circuit's approach exalts form over substance. But as this Court has pointed out, "ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1980).

B. *The Decision Below Allows States To Impose Inconsistent Requirements on ERISA-Covered Plans.*

Congress intended ERISA's preemption clause to establish a

national, uniform regulatory scheme for employee benefit plans.[10] ERISA's preemption clause is "deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). This Court has "not hesitated to apply ERISA's pre-emption clause to state laws that risk subjecting plan administrators to conflicting state regulations," *FMC Corp. v. Holliday*, --- U.S. ---, 111 S.Ct. 403, 408 (1990), *citing Shaw* and *Alessi*, or to a "patchwork scheme of regulation" which would cause "inefficiencies in benefit program operation," *id., citing Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10, 11 (1987).

The decision below would frustrate this Congressional intent. Each state could impose its own conflicting set of ERISA plan regulations through the loophole opened by the Second Circuit. While Connecticut requires employers to extend benefits in perpetuity to former employees receiving workers' compensation, another state might require only two years of coverage, and a third might require nothing for workers' compensation recipients while requiring employers to extend benefits to all laid-off workers until they find new jobs. A firm like Petitioner Donnelley, which does business in several states, could be whipsawed among these conflicting regulations. As this Court stated in *Shaw*:

> An employer with employees in several States would find its plan subject to a different jurisdictional pattern of regulation in each State, depending on what benefits the State mandated under disability, workmen's compensation and unemployment compensation laws. The administrative impracticality of permitting mutually exclusive pockets of federal and state

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[10] Sen. Williams, the Senate sponsor of ERISA, explained that the supersedure clause was "intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in the broadest sense to all actions of State or local governments . . . ." 120 Cong. Rec. 29,933 (1974) quoted in *Shaw v. Delta Air Lines*, 463 U.S. at 99.

jurisdiction within a plan is apparent.

463 U.S. at 107. This chaos of interstate conflict is exactly what the Second Circuit's misreading of *Shaw* will produce and exactly what Congress intended to prevent.

III. CONCLUSION

For the reasons set forth above, CBIA respectfully requests that this Court grant the petition for writ of certiorari and reverse the decision of the Second Circuit.

DATED: Boston, Massachusetts: March 8, 1991.

Respectfully submitted,
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